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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

ANNA MARIA SAHNI, Plaintiff and Appellant, v. EMERALD MORTGAGE CORPORATION et al., Defendants and Respondents.	B204071 (Los Angeles County Super. Ct. No. LC076509)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard A. Adler, Judge. Reversed with directions.

Law Offices of M. Michael Saint-George and M. Michael Saint-George for Plaintiff and Appellant.

Law Offices of Arthur D. Hodge and Arthur D. Hodge for Defendants and Respondents Emerald Estate Escrow, Inc., Universal Estate Properties, Inc., Damon Berg, Markus Shepherd, and Ellen T. Lee.

Law Offices of Barak Isaacs and Barak Isaacs for Defendant and Respondent Tyler Bearde.

The present action for fraud and other torts alleges that plaintiff Anna Maria Sahni was the victim of a foreclosure rescue scam through which plaintiff lost her home and all of her accumulated equity in it. The trial court dismissed the action after sustaining defendants' demurrers to the third amended complaint without leave to amend. We reverse with directions.

FACTUAL AND PROCEDURAL HISTORY

I. The Alleged Foreclosure Rescue Scheme

The following facts, which we presume to be true for purposes of this appeal, are taken from the third amended complaint.[1]

Plaintiff purchased a home located at 7300 Fallbrook, West Hills, California, in 1997. In 2005, plaintiff experienced financial difficulties and was facing foreclosure.

In July 2005, plaintiff was solicited at her home by two agents of defendant Emerald Mortgage Corporation (Emerald Mortgage). They told plaintiff that Emerald Mortgage specialized in saving homeowners from foreclosure and had helped many other people in plaintiff's circumstances. They offered to set up a meeting between plaintiff and defendant Damon Berg, an Emerald Mortgage employee, to discuss the particulars of a "foreclosure rescue" transaction.

Based on the statements of Emerald Mortgage's employees, plaintiff met with Berg in Emerald Mortgage's offices in July 2005. She told Berg that she was trying to save her home from foreclosure and that she wanted to keep her house. Berg assured her that he would help her avoid foreclosure and that she would not lose her home.

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[1] In reviewing the trial court's order sustaining defendants' demurrers, we presume to be true the material factual allegations in plaintiff's operative complaint, as well as those that may be implied or inferred therefrom. We disregard conclusions of law and factual allegations that are contrary to facts judicially noticed. (*Armijo v. Miles* (2005) 127 Cal.App.4th 1405, 1409; *Barratt American, Inc. v. City of San Diego* (2004) 117 Cal.App.4th 809, 812, fn. 2.)

Berg told plaintiff that he would first appraise the property and bring the mortgage payments current. Then, he would produce a trustworthy "straw buyer" with good credit who, for a fee of $5,000, would obtain a new loan and take title to her property "on paper only." He repeatedly reassured plaintiff that she would be able to stay in her home and, a few years later, could take title back in her own name.

As a result of this meeting, plaintiff became the target of a "'foreclosure rescue' scheme directed at desperate homeowners. In a foreclosure rescue scam, the perpetrator identifies homeowners who are at risk of defaulting on loans or whose houses are already in foreclosure. Perpetrators mislead the homeowners into believing that they can save their homes in exchange for a transfer of the deed and up-front fees. Homeowners lo[se] their homes and the perpetrator profits from these schemes by remortgaging the property or pocketing fees paid by the homeowner."

In July 2005, Berg arranged a three-month loan from defendant Markus Shepherd, Emerald Mortgage's principal, to bring the first and second mortgage payments current. Subsequently, Berg told plaintiff that he had located a prospective "straw buyer," defendant Tyler Bearde, who had good credit and would take title to plaintiff's home "on paper" only. Berg said that Bearde was interested in the transaction because it had tax advantages for him, and that the $5,000 fee Bearde was charging was low because "as a high earner, Bearde need[ed] the tax write-offs." Berg specifically reassured plaintiff that she would not lose her home and that she would be able to continue to live in it.

Based on Berg's assurances, plaintiff transferred the house to Bearde. In doing so, plaintiff paid nearly $30,000 in fees, costs, and other charges, including all of the closing costs and escrow charges, all of Bearde's loan costs and fees, and a $14,000 real estate commission to defendant Ellen Lee, principal of defendant Universal Estate Properties, Inc. (Universal), for services "[p]laintiff never agreed to and were neither needed nor performed."[2] The escrow was conducted through defendant Emerald Estate Escrow, Inc.

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[2] The escrow closing statement attached to plaintiff's complaint shows that plaintiff paid nearly $30,000 in fees, taxes, closing costs, and other charges, as follows: "Seller paid closing costs" of $9,113; a seller's broker's commission (to Universal) of $14,000;

(Emerald Escrow), which plaintiff alleges was controlled by Emerald Mortgage's principal.

Shortly after escrow closed, plaintiff and Bearde executed an "option to repurchase" that purported to allow plaintiff to stay in her home by making monthly mortgage payments to Bearde and to repurchase her home after obtaining new financing. However, in November 2006, plaintiff was unable to make the monthly payments and Bearde filed an unlawful detainer action against her, ultimately evicting her from her home.

II. The Complaint

Plaintiff filed a complaint on December 11, 2006, against Emerald Mortgage, Emerald Escrow, Universal, Bearde, Berg, Shepherd, and Lee. It alleged seven causes of action arising out of the alleged foreclosure rescue scheme described above: (1) intentional misrepresentation; (2) breach of fiduciary duty; (3) constructive fraud; (4) negligent misrepresentation; (5) intentional infliction of emotional distress; (6) conversion; and (7) injunction.

Bearde demurred. On April 16, 2007, the trial court sustained demurrers to the first through fifth causes of action with leave to amend, and sustained demurrers to the sixth and seventh causes of action without leave to amend. The court explained that the fraud causes of action were not pled with sufficient specificity because there was no showing of what Bearde said to plaintiff, where the alleged fraud was committed, and by what means the alleged fraud was tendered by Bearde. Further, the court said that plaintiff had conceded in her deposition (the transcript of which the court took judicial notice) that Bearde never said anything to her that was false; the complaint set forth insufficient facts showing that Bearde owed a fiduciary duty to plaintiff; and the complaint did not allege that Bearde did anything wrong when he initiated unlawful

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title charges (to Stewart Title) of $4,766; and escrow charges (to Emerald Estate Escrow) of $1,700.

detainer proceedings. Finally, the court found that there can be no conversion of real property and that injunctive relief is a remedy, not a cause of action.

III. The First, Second, and Third Amended Complaints

Plaintiff filed a first amended complaint on April 23, 2007. Defendants demurred, and the court sustained the demurrers with leave to amend. Plaintiff filed a second amended complaint on June 4, 2007, and the court again sustained defendants' demurrers with leave to amend.

Plaintiff filed a third amended complaint on July 11, 2007. The court sustained the demurrers without leave to amend on August 21, 2007. It explained as follows.

- Intentional and negligent misrepresentation. The court suggested that plaintiff had not adequately pled justifiable reliance because she conceded that she knew she was in financial distress. It explained: "[I]t is unclear how Defendants mis[led] Plaintiff when (1) Plaintiff knew she was in financial distress and that her home faced foreclosure, and (2) the repurchase terms are clearly set forth in the written Contract attached as Exhibit 4 to the Second Amended Complaint. There are no facts showing that Defendant attempted to hide or change the terms of the contract." Further, "in that Plaintiff was able to make several rent payments before being evicted by way of a[n] Unlawful Detainer action in December 2006, it is unclear why Defendants would know that she would eventually not be able to make the payments." Finally, the court found that plaintiff's allegations of a conspiracy were not sufficient: "'[T]here are insufficient facts as to **each Defendant** showing what they said, wrote, or when it was said. The allegations set forth in the [Third Amended Complaint] are conclusory and, thus, are insufficient to show that each defendant had knowledge of and agreed to both the objective and course of action [i.e. fraud] to injure the plaintiff."

- Breach of fiduciary duty. The court said that the third amended complaint set forth insufficient facts showing that defendants breached any fiduciary duty to Plaintiff. It explained: "[T]he terms of the agreement clearly set forth all the events Plaintiff now claims constitute part of a scheme [citation]. Merely because Plaintiff lost

her home due to her inability to pay the rent money due, does not mean that she was the victim of a 'foreclosure rescue' scheme."

- Intentional infliction of emotional distress. The court said that there were no factual allegations that Bearde did anything wrong when he initiated unlawful detainer proceedings against plaintiff or why he should be liable for the actions of the other defendants. Further, "as Plaintiff agreed to the lease and repurchase contract terms, it cannot be claimed, as Plaintiff alleges, that Defendants 'defrauded' her by making her pay 'for all costs and fees associated with Bearde obtaining a purchase loan agreement.'" Finally, as to the other defendants, "as each of the previous causes of action are not properly pled, this cause of action is also subject to demurrer."

- No leave to amend. The court noted that it had inquired of counsel whether "any 'new facts'" could be pled, and counsel responded "that he had already pled 'all the necessary facts' and made no further offer of proof." "Therefore, since Plaintiff fails to explain her earlier pleadings and fails to allege any facts which show that the complaint is capable of amendment to state a valid cause of action against any of the named Defendants, the Court sustains the demurrer without leave to amend."

IV. Judgment and Appeal

Judgment of dismissal was entered on September 17, 2007, and notice of entry of judgment was served on September 18, 2007. On October 25, 2007, the court deemed Bearde the prevailing party and awarded him attorney fees of $12,000.

Plaintiff filed this timely appeal from the judgment and the order awarding attorney fees on November 14, 2007.

DISCUSSION

I. Standard of Review

"""On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether

the complaint states a cause of action as a matter of law."' (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) In reviewing the complaint, 'we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable.' (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.) 'If the complaint states a cause of action under any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against a demurrer.' (*Quelimane Co. v. Stewart Title Guaranty Co*. (1998) 19 Cal.4th 26, 38 . . . .)" (*Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 880-881.)

"We review the trial court's denial of leave to amend for an abuse of discretion. (*Blank v. Kirwan* [(1985)] 39 Cal.3d [311,] 318; *Hernandez v. City of Pomona* [(1996)] 49 Cal.App.4th [1492,] 1497-1498.) 'When a demurrer is sustained without leave to amend, we determine whether there is a reasonable probability that the defect can be cured by amendment. [Citation.]' (*V.C. v. Los Angeles Unified School Dist*. (2006) 139 Cal.App.4th 499, 506.) Appellants bear the burden of demonstrating the trial court erred in sustaining the demurrer or abused its discretion in denying leave to amend. (*Blank v. Kirwan*, *supra*, at p. 318; *V.C. v. Los Angeles Unified School Dist*., *supra*, at pp. 506-507.)" (*In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1263.)

II. The Trial Court Erred in Sustaining the Demurrers Without Leave to Amend

A. First, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelfth Causes of Action—Intentional Misrepresentation, Negligent Misrepresentation, and Fraud

Plaintiff's first and fourth causes of action allege intentional and negligent misrepresentation. The sixth through twelfth causes of action allege fraud. For the reasons that follow, we conclude that the trial court erred in (1) sustaining demurrers to the causes of action for negligent misrepresentation and fraud, and (2) denying plaintiff leave to amend the cause of action for intentional misrepresentation.

Civil Code section 1709 provides a cause of action for "fraudulent deceit": "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damages which he thereby suffers." Civil Code section 1710 specifies four kinds of fraud within the meaning of Civil Code section 1709: (1) intentional misrepresentation ("The suggestion, as a fact, of that which is not true, by one who does not believe it to be true"); (2) negligent misrepresentation ("The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true"); (3) concealment ("The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact"); and false promise ("A promise, made without any intention of performing it"). (Civ. Code, § 1710; see also 5 Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 767, p. 1115.) Intentional and negligent misrepresentation, thus, are particular kinds of fraud, not independent causes of action. Because of the overlap among the fraud and misrepresentation causes of action, we discuss them together.

The elements of a cause of action for fraud by intentional misrepresentation are (1) a misrepresentation, (2) made with knowledge of its falsity (scienter), (3) intent to defraud or to induce reliance, (4) justifiable reliance, and (5) resulting damage. (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 363; *R & B Auto Center, Inc. v. Farmers Group, Inc*. (2006) 140 Cal.App.4th 327, 377.) A claim for fraud by negligent misrepresentation requires proof of each of the foregoing elements except for knowledge of the falsity of the representation; an honest belief in the truth of the statement, without a reasonable ground for that belief, is sufficient. (*R & B Auto Center, Inc. v. Farmers Group, Inc*., *supra*, 140 Cal.App.4th at p. 377.)

"Fraud allegations must be pled with more detail than other causes of action. The facts constituting the fraud, including every element of the cause of action, must be alleged '"factually and specifically."' (*Committee on Children's Television, Inc. v. General Foods Corp*. (1983) 35 Cal.3d 197, 216 . . . .) The objectives are to give the defendant notice of '"definite charges which can be intelligently met,"' and to permit the court to determine whether, '"'on the facts pleaded, there is any foundation, prima facie

at least, for the charge of fraud.'" [Citations.]' (*Id*. at pp. 216-217.)" (*Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 240.) There is an exception to the strict pleading standard, however, where it appears that the relevant facts lie within defendant's knowledge: "Less specificity is required when 'it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy' (*Bradley v. Hartford Acc. & Indem. Co*. (1973) 30 Cal.App.3d 818, 825); "[e]ven under the strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party . . . .' (*Turner v. Milstein* (1951) 103 Cal.App.2d 651, 658.)" (*Committee on Children's Television, Inc. v. General Foods Corp*., *supra*, 35 Cal.3d at p. 217, superseded by statute on other grounds as stated in *Californians for Disability Rights v. Mervyn's, LLC* (2006) 39 Cal.4th 223, 227.)

1. Misrepresentations

The first element of fraud by intentional or negligent misrepresentation is a misrepresentation. The operative complaint alleges that Berg and Emerald Mortgage made several misrepresentations to plaintiff prior to the sale of her house. It alleges that in July 2005, two agents of Emerald Mortgage approached plaintiff and told her that Emerald Mortgage could help to save her home from foreclosure. It further alleges that during a July 2005 meeting at the offices of Emerald Mortgage, Berg "reassured [plaintiff] that she could avoid foreclosure through Defendants' help" and "told Plaintiff specifically that she will not lo[se] her home because he will implement a plan that will enable her to keep her house." He explained that he would "produce a trustworthy 'straw buyer' with good credit, who, for a fee of $5,000[,] will obtain a fresh loan and take title to her property on paper only. He repeatedly reassured Plaintiff that she can stay in her home and a few years later she will be able to take the title back in her own name." During a subsequent meeting at Emerald Mortgage's offices in August 2005, Berg told plaintiff that defendant Bearde would serve as a "straw buyer"; that Bearde "does not want to buy the home and will take title in his name 'on paper' only"; that "Bearde is

interested in the transaction only because it has great tax advantages for him;" and that plaintiff "will not lo[se] her home and . . . will be able to remain in possession." These representations were untrue: Plaintiff lost title to her home in August 2005 when she transferred title to Bearde, and she lost possession of her home in November 2006 when Bearde filed an unlawful detainer action against her.

These allegations sufficiently allege misrepresentations by Berg. "It is well-established that, '[i]n California, fraud must be pled specifically; general and conclusory allegations do not suffice. . . . "This particularity requirement necessitates pleading facts which 'show how, when, where, to whom, and by what means the representations were tendered.'" [Citation.]' (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.)" (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1421-1422.) Plaintiff's allegations against Berg satisfy this requirement of particularity: The third amended complaint alleges to whom Berg made the misrepresentations (to plaintiff), when and where they were made (in Emerald Mortgage's offices, in July and August 2005), and by what means they were tendered (through promises that plaintiff could avoid foreclosure and retain title to and possession of her home).

Further, because the complaint alleges a conspiracy to defraud among all defendants, the allegations of misrepresentations by Berg are sufficient to support causes of action for fraud against the other defendants. A defendant may be held liable for the misrepresentations of a codefendant if he or she jointly participated in a conspiracy to commit fraud. "In order to maintain an action for conspiracy, a plaintiff must allege that the defendant had knowledge of and agreed to both the objective and the course of action that resulted in the injury, that there was a wrongful act committed pursuant to that agreement, and that there was resulting damage. [Citation.] Civil conspiracy is not an independent tort. [Citation.] Rather, it is a '"legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." [Citation.]' [Citation.] 'The major significance of a conspiracy cause of action "lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all

damages ensuing from the wrong . . . regardless of the degree of his activity. [Citations.]"' [Citation.]" (*Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823.) "As Witkin explains: 'If [the plaintiff] can show that each [of several defendants] committed a wrongful act or some part of it, e.g., that each made false representations, he has no need of averments of conspiracy. But if A alone made representations, the plaintiff can hold B and C liable with A only by alleging and proving that A acted pursuant to an agreement (conspiracy) with B and C to defraud.' (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 869, p. 311.)" (*Kidron v. Movie Acquisition Corp.* (1995) 40 Cal.App.4th 1571, 1581.)

In the present case, the operative complaint alleges that "on or about July, 2005, Defendants, and each of them, devised a fraudulent scheme, and knowingly and willfully conspired and agreed among themselves to perpetrate the 'mortgage rescue' fraud on Plaintiff to deprive her of her home and the equity that she has built up in her home." It further alleges that each defendant "had knowledge of the plan to deprive Plaintiff of her home and her equity, and agreed to [a] course of action orchestrated by Defendant Berg and Defendant Emerald . . . ." Because these allegations assert that each defendant knew of and agreed to participate in the alleged mortgage rescue fraud, that plaintiff was wrongfully deprived of her home as a result of the conspiracy among the defendants, and that plaintiff suffered damages as a result, they are sufficient to allege a conspiracy among the defendants to take plaintiff's home.[3]

The trial court concluded that plaintiff's conspiracy allegations were insufficient because they did not allege "facts as to **each Defendant** showing what they said, wrote, or when it was said." We do not agree. At the pleading stage, plaintiff need not allege the formation of a conspiracy between defendants in the detail the trial court suggested. As our Supreme Court has noted, "'conspirators rarely make such agreements in the open

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[3] Because the misrepresentation claims against these defendants are premised on an alleged conspiracy, not on the defendants' own statements, we find irrelevant plaintiff's apparent concession at her deposition that defendant Bearde never said anything to her that was false.

or document their illicit agreements. Rather, it is usually the situation that such agreements are made covertly, thereby making it difficult for a plaintiff to allege the full details of such . . . agreement prior to its ability to engage in the "rock-turning" allowed by discovery.'" (*Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at p. 48, quoting *Cellular Plus, Inc. v. Superior Court* (1993) 14 Cal.App.4th 1224, 1239.) Thus, "'[g]eneral allegations of agreement have been held sufficient [citation], and the conspiracy averment has even been held unnecessary, providing the unlawful acts or civil wrongs are otherwise sufficiently alleged.'" (*Quelimane Co. v. Stewart Title Guaranty Co.*, *supra*, 19 Cal.4th at p. 47.)

2. Knowledge of Falsity

The second element of fraud by intentional or negligent misrepresentation is defendants' knowledge of the falsity of the misrepresentation (intentional misrepresentation) or defendants' lack of a reasonable belief in the truth of the misrepresentation (negligent misrepresentation). In this regard, the operative complaint alleges that defendants "made the foregoing representations without reasonable grounds for believing them to be true, with reckless disregard for whether they were true, or should have known them not to be true."

Because these allegations allege defendants' lack of reasonable belief in the truth of the misrepresentation, they satisfy the scienter requirement of negligent misrepresentation. They do not, however, satisfy the scienter requirement of intentional misrepresentation. "A complaint for intentional misrepresentation may allege either 'the [defendant's] actual knowledge of the false or baseless character of its [statement]' or the [defendant] had '"no belief in the truth of the statement, and [made] it recklessly, without knowing whether it is true or false . . . ."'" (*Nutmeg Securities, Ltd. v. McGladrey & Pullen* (2001) 92 Cal.App.4th 1435, 1448, fn. omitted.) The operative complaint does not allege either: While it alleges that defendants made the alleged misrepresentations without reasonable grounds for believing them to be true and with reckless disregard for

whether they were true, it does not allege that defendants actually knew or suspected that their statements were untrue.

3. Intent to Defraud or to Induce Reliance

The third element of fraud by intentional and negligent misrepresentation is intent to induce plaintiff's reliance on defendants' misrepresentations. (E.g., *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC*, *supra*, 158 Cal.App.4th 226, 240.) The complaint alleges that defendants made the misrepresentations described above "with the intent to deceive and induce Plaintiff to sign over the title to her home to Defendants and to pay an amount that Defendants were clearly not entitled to." This adequately pleads intent to defraud.

4. Justifiable Reliance

The fourth element of fraud by intentional and negligent misrepresentation is justifiable reliance. "A plaintiff asserting fraud by misrepresentation is obliged to plead and prove actual reliance, that is, to '"establish a complete causal relationship" between the alleged misrepresentations and the harm claimed to have resulted therefrom.' (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1092, quoting *Garcia v. Superior Court* [(1990)] 50 Cal.3d [728,] 737.)" (*Buckland v. Threshold Enterprises, Ltd*. (2007) 155 Cal.App.4th 798, 807.) Plaintiff adequately pled this element by alleging that she "believed in and justifiably relied on the representations of Defendants and was thereby induced to sign over the title to her home to Defendants and to pay an amount that Defendants were not entitled to."

The trial court concluded that plaintiff could not have relied on defendants' representations because, by her own admission, she "knew she was in financial distress and that her home faced foreclosure."[4] We do not agree. Plaintiff's knowledge that she

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[4] The trial court also suggests that plaintiff could not have justifiably relied on defendants' representations "'when she knew, in advance, that she would not be able to repurchase the property.'" We have carefully examined the third amended complaint and

was behind on her mortgage payments is not fatally inconsistent with her reliance on defendants' representations that, through their intervention, she would be able to avoid foreclosure and retain her home. Indeed, it appears to us that a plaintiff's knowledge that she is in financial distress and is facing foreclosure might make her *more* vulnerable to the kinds of misrepresentations alleged in the operative complaint, not less so.[5]

We also do not agree with the trial court that plaintiff could not have relied on defendants' misrepresentations because "the repurchase terms are clearly set forth in the written Contract attached as Exhibit 4 [to the third amended complaint]" and "[t]here are no facts showing that Defendant attempted to hide or change the terms of the contract." While parol evidence is inadmissible to alter the terms of a written agreement, under some circumstances a defendant's misrepresentations about the terms of a written agreement constitute actionable fraud. (E.g., Greenwald & Asimow, Cal. Practice Guide: Real Property Transactions (The Rutter Group 2005) ¶ 11:355.10, p. 11-57 ["Parol evidence of fraudulent representations is admissible as an exception to the parol evidence rule [citation] to show that a contract was fraudulently induced. . . . Extrinsic evidence of factual misrepresentations over the content of a contract at the time of its execution likewise is admissible under this exception."]; *Pacific State Bank v. Greene* (2003) 110 Cal.App.4th 375, 396 [no evidentiary bar to admission of parol evidence "of a mischaracterization—that is, a misrepresentation of *fact*—over the content of an agreement at the time of the signing"]; *Continental Airlines, Inc. v. McDonnell Douglas*

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we are not aware of any allegations by the plaintiff that she knew in advance that she would not be able to repurchase the property.

[5] The trial court attributed great significance to plaintiff's "'**blatant omission** from the [third amended complaint] of her previously set forth allegation (in each of her previous complaints) that Defendants had advance knowledge that she would not be able to afford the payments or obtain the required financing to repurchase the Property.'" According to the trial court, "'Sahni's blatant omission of said allegation is obvious: if the allegation remains, Sahni can not plead justifiable reliance, an element of fraud.'" We do not agree: While defendants' knowledge of plaintiff's inability to satisfy the repurchase terms of the contract are relevant to the second element of plaintiff's fraud claim (knowledge of the falsity of the misrepresentation), it is irrelevant to justifiable reliance.

Corp. (1989) 216 Cal.App.3d 388, 424 [defendant's precontractual factual representations about the airplane plaintiff purchased pursuant to a written contract were actionable; to conclude otherwise "would be to nullify Code of Civil Procedure section 1856, subdivision (g), the fraud exception to the parol evidence rule, which specifically allows evidence of representations which contradict or vary the terms of a contract in order to establish fraud"]; *Richard v. Baker* (1956) 141 Cal.App.2d 857, 863 ["It is . . . settled that parol evidence of fraudulent representations is admissible as an exception to the parol evidence rule to show that a contract was induced by fraud. . . . 'Parol evidence is always admissible to prove fraud, and it was never intended that the parol evidence rule should be used as a shield to prevent the proof of fraud.'"] Thus, the existence of a written contract is not an insurmountable barrier to plaintiff's reasonable reliance.

5. Resulting Damage

The fifth element of fraud by intentional or negligent misrepresentation is damages. Plaintiff adequately pled this element by alleging that "[a]s a foreseeable and proximate result of Defendants' intentional misrepresentations," plaintiff "lost her home and her life savings." Further, "Defendants also took for themselves the equity that the Plaintiff had built up in her home, as well as additional fees, commissions and other payments directly from the Plaintiff. As a further proximate result of the wrongful acts perpetrated by Defendants, and each of them, Plaintiff has sustained, and will continue to sustain, disabling, serious and permanent physical and emotional injuries . . . ." This suffices to allege damages resulting from the alleged fraudulent misrepresentations.

6. Conclusion

We conclude that plaintiff has adequately pled all of the elements of negligent misrepresentation. Further, because "in California negligent misrepresentation is a form of fraud and deceit under [Civil Code] sections 1710, subdivision 2, and 1572, subdivision 2" (*Continental Airlines, Inc. v. McDonnell Douglas Corp.*, *supra*, 216 Cal.App.3d at pp. 403-404), plaintiff has adequately pled the elements of fraud. We

therefore reverse the trial court's order sustaining defendants' demurrers to the causes of action for negligent misrepresentation and fraud.

We reach a different conclusion with regard to intentional misrepresentation. As indicated above, we do not believe that plaintiff has adequately pled the scienter element of intentional misrepresentation, and thus we affirm the trial court order's sustaining the demurrers to the first cause of action. However, we conclude that the trial court abused its discretion by denying plaintiff leave to amend. Leave to amend a complaint should be granted where there is a reasonable possibility that the complaint's defect can be cured by amendment. (*Wilkinson v. Zelen* (2008) 167 Cal.App.4th 37, 49; *McKenney v. Purepac Pharmaceutical Co*. (2008) 167 Cal.App.4th 72, 78.) Here, we believe that there is a reasonable possibility that plaintiff can amend her complaint to allege scienter. We note in this regard that plaintiff has asserted in her appellant's opening brief that "Defendants knew that, because of Plaintiff's financial distress and the onerous 'repurchase' terms, Plaintiff would never be able to afford the monthly payments, or obtain the required financing to get her home back." Thus, the trial court abused its discretion by denying plaintiff leave to amend.

B. Second and Third Causes of Action—Breach of Fiduciary Duty and Constructive Fraud

The second and third causes of action allege breach of fiduciary duty and constructive fraud. "The elements of a cause of action for breach of fiduciary duty are: (1) the existence of a fiduciary duty; (2) a breach of the fiduciary duty; and (3) resulting damage. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1998) 68 Cal.App.4th 445, 483.)" (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 524.) The elements of constructive fraud are similar. "'"'Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.' [Citation.] [¶] '[A]s a general principle constructive fraud comprises any act, omission or concealment involving a breach of legal or equitable duty, trust or confidence which results in damage to another even though the conduct is not otherwise fraudulent. Most acts by an agent in

breach of his fiduciary duties constitute constructive fraud. The failure of the fiduciary to disclose a material fact to his principal which might affect the fiduciary's motives or the principal's decision, which is known (or should be known) to the fiduciary, may constitute constructive fraud.'"'" (*Michel v. Moore & Associates, Inc.* (2007) 156 Cal.App.4th 756, 763; see also *Assilzadeh v. California Federal Bank* (2000) 82 Cal.App.4th 399, 415 [same].)

Defendants assert that the operative complaint fails to state claims for breach of fiduciary duty or constructive fraud because it does not allege facts that, if true, would establish fiduciary or confidential relationships between plaintiff and defendants. With the exception of defendant Bearde, we do not agree. The complaint alleges that when plaintiff sold her house to Bearde in 2005, defendants Emerald Mortgage, Marcus Shepherd, and Damon Berg acted as the mortgage brokers, Emerald Escrow acted as the escrow agent, and Universal and Ellen Lee acted as seller's real estate agent. Under California law, mortgage brokers, escrow agents, and real estate agents all owe fiduciary duties to their clients. (*Barry v. Raskov* (1991) 232 Cal.App.3d 447, 455-456 [loan brokers; "A mortgage loan broker owes a fiduciary duty of the 'highest good faith toward his principal' and 'is "charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision"'"]; *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co*. (2002) 27 Cal.4th 705, 711 [escrow holder]; *Roberts v. Lomanto* (2003) 112 Cal.App.4th 1553, 1562-1563 [real estate broker; "'The law imposes on a real estate agent "the same obligation of undivided service and loyalty that it imposes on a trustee in favor of his beneficiary." [Citations.] This relationship not only imposes upon him the duty of acting in the highest good faith towards his principal but precludes the agent from obtaining any advantage over the principal in any transaction had by virtue of his agency. [Citation.] "Such an agent is charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision." [Citations.]'"] Accordingly, the complaint adequately alleges fiduciary relationships between plaintiff and these defendants.

We reach a different conclusion with regard to defendant Bearde. Although the complaint alleges that Bearde was a real estate broker, nothing in the complaint suggests that plaintiff was Bearde's client. Rather, the complaint alleges that Bearde purchased plaintiff's home and then rented it back to her. Plaintiff cites no authority for the proposition that a purchaser of real property owes a fiduciary duty to the seller, or that a landlord owes a fiduciary duty to a tenant. We therefore conclude that plaintiff has not adequately alleged a fiduciary relationship between herself and Bearde. Further, because plaintiff has not contended that she can amend her complaint to allege that Bearde owed her a fiduciary duty, we conclude that the trial court did not abuse its discretion by sustaining the demurrer without leave to amend as to him.

C. Fifth Cause of Action—Intentional Infliction of Emotional Distress

Plaintiff's fifth cause of action alleges intentional infliction of emotional distress against all defendants. To state a cause of action for intentional infliction of emotional distress, the plaintiff must allege: "'(1) extreme and outrageous conduct by the defendant with the intention of causing, or reckless disregard of the probability of causing, emotional distress; (2) the plaintiff's suffering severe or extreme emotional distress; (3) and actual and proximate causation of the emotional distress by the defendant's outrageous conduct.' (*Cervantez v. J. C. Penney Co*. (1979) 24 Cal.3d 579, 593.)" (*Hailey v. California Physicians' Service* (2007) 158 Cal.App.4th 452, 473-474.) "To state a cause of action, the conduct alleged must be '"so extreme and outrageous 'as to go beyond all possible bo[u]nds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'"' (*Coleman v. Republic Indemnity Ins. Co*. (2005) 132 Cal.App.4th 403, 416 . . . .) '"Behavior may be considered outrageous if a defendant (1) abuses a relation or position which gives him power to damage the plaintiff's interest; (2) knows the plaintiff is susceptible to injuries through mental distress; or (3) acts intentionally or unreasonably with the recognition that the acts are likely to result in illness through mental distress."' (*Agarwal v. Johnson* (1979) 25 Cal.3d 932, 946, disapproved on another ground in *White v. Ultramar, Inc*. (1999) 21 Cal.4th 563, 575,

fn. 4; *McDaniel v. Gile* (1991) 230 Cal.App.3d 363, 372.)" (*Hailey v. California Physicians' Service*, *supra*, 158 Cal.App.4th at p. 474.) Whether a defendant's conduct can reasonably be found to be outrageous is a question of law that must initially be determined by the court; if reasonable persons may differ, it is for the jury to determine whether the conduct was, in fact, outrageous. (*Berkley v. Dowds* (2007) 152 Cal.App.4th 518, 534.)

Defendants asserted in their demurrers that the conduct alleged in the third amended complaint "bear[s] no resemblance to the extreme and outrageous conduct to exceed all bounds of what is usually tolerated in civilized community." We do not agree. Plaintiff alleges that defendants sought her out at a time when she faced foreclosure and feared losing her home, promised to help her save her home from foreclosure, and ultimately took from her both her home and her accumulated equity in it. If plaintiff is able to prove this at trial, we believe that a reasonable jury could conclude that defendants' actions were outrageous. The trial court thus erred in sustaining the demurrer to this cause of action.

III. Plaintiff Has Not Demonstrated That She Was Prejudiced by the Trial Court's Refusal to Allow Her to Plead Additional Causes of Action

In its order sustaining defendant Bearde's demurrer to the original complaint, the trial court ordered that "[p]laintiff is not given leave to amend to add any new causes of action." Plaintiff contends that this was error and that, if she had been allowed to plead additional causes of action, "it is conceivable that she could have — *based on the same general set of facts* — cured the defects in her pleadings by adding such new causes of action."

"Discretionary trial court rulings are reviewed under the 'abuse of discretion' standard. 'Under the "abuse of discretion" standard of review, appellate courts will disturb discretionary trial court rulings only upon a showing of a "clear case of abuse" and "a miscarriage of justice."' [Citation.]" (*In re ANNRHON, Inc*. (1993) 17 Cal.App.4th 742, 751-752, quoting *Blank v. Kirwan*, *supra*, 39 Cal.3d 311, 331.) Further,

even if we find that the trial court abused its discretion, we will reverse "only if the party appealing demonstrates a 'miscarriage of justice'—that is, that a different result would have been probable if the error had not occurred." (*Zhou v. Unisource Worldwide* (2007) 157 Cal.App.4th 1471, 1480.)

Assuming without deciding that the trial court abused its discretion by denying plaintiff the opportunity to add new causes of action, plaintiff has made no showing that she was prejudiced by the error. That is, although plaintiff suggests that "*it is conceivable*" that she could have cured defects in her pleadings by adding new causes of action, she does not demonstrate that this is so by identifying the new causes of action she would have added and establishing that those new causes of action were not themselves vulnerable to demurrer. Accordingly, plaintiff has not shown reversible error.

DISPOSITION

The judgment of dismissal is reversed. The order sustaining the demurrers without leave to amend is vacated and the cause is remanded with directions to enter a new and different order (1) sustaining with leave to amend the demurrers of all defendants to the first cause of action for intentional misrepresentation; (2) sustaining without leave to amend the demurrer of defendant Bearde to the second and third causes of action for breach of fiduciary duty and constructive fraud; (3) overruling the demurrers of all remaining defendants to the second and third causes of action for breach of fiduciary duty and constructive fraud; (4) overruling the demurrers of all defendants to the fourth cause of action for negligent misrepresentation; (5) overruling the demurrers of all defendants to the fifth cause of action for intentional infliction of emotional distress; and (6) overruling the demurrers of all defendants to the sixth through twelfth causes of action for fraud. Further, as defendants are no longer the prevailing parties, the order

granting attorney fees and costs is reversed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.